SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 528

SOUTHWEST FOREST INDUSTRIES, INC., Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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Westinghouse is in error in each of the arguments it makes in its Response as reasons for denying Certiorari. Pennsylvania law does not warrant the decisions below. The exculpatory warranty is not peculiar to this contract. The warranty problem is applicable to consumers. There is a present conflict between the Ninth Circuit Court of Appeals and the Third Circuit Court of Appeals.

These subjects are not discussed in this order but each is covered herein.

SOUTHWEST NOT A CONSUMER

Westinghouse claims that Southwest is not a consumer (Response pp. 10-11) and infers a different issue is thereby presented. It is not necessary to decide if Southwest is a consumer, the benefit to those who unquestionably are consumers still remains.

If the Court accepts this petition, and the consuming public benefits thereby, it is the fortune of the public that Westinghouse employed subsantially the same warranty in dealing with one that could afford to come to this Court that it employs with consumers of coffeepots, toasters, washing machines, dryers, refrigeration units, electrical motors, freezers, skillets, ovens and untold other items.

The "warranty" of Westinghouse is not employed by Westinghouse alone. A reading of the cases cited to this Court reveals that automobile manufacturers, manufacturers of farm machinery as well as a variety of other products all employ a similar exculpatory warranty.

It is perfectly clear that a decision specifying the duty of Westinghouse to adequately repair under its "warranty" will apply to *all* to whom the warranty is issued, be they consumers or not.

Westinghouse says Southwest "wrings the bleeding heart." (Response p. 10) The point is simply that litigation between Southwest and Westinghouse does not, alone, raise an issue which this Court would consider sufficiently significant to decide. The import of a decision to literally millions of transactions involving consumers is of that significance.

Westinghouse concludes that a determination of liabilities flowing from ". . . the burning of a house caused by a coffeepot's defective wiring, . . . should be made when that case is before . . . (this Court)." Response p. 11)

When will a home-owner appear on the scene of sufficient means and determination to litigate with an industrial giant through the Federal District Court, the Court of Appeals and the Supreme Court of the United States? Westinghouse obviously hopes never.

ISSUES PRESENTED

Southwest concedes that in addition to the one issue in its Petition, there were numerous other issues before the District Court and before the Court of Appeals. Westinghouse has seen fit to enumerate a large number of the other issues (Response, pp. 3-5). Such recitation of the other issues below only obfuscates the issue here presented.

In describing the issues Westinghouse states "counsel (for Southwest) repeatedly asserted that Southwest was proceeding only on a contract theory." (Response p. 5) Such an assertion by Southwest at trial is in no manner inconsistent with the position Southwest advocates before this Court. The duty of Westinghouse arises by virtue of its agreement to repair contained in its "Warranty." Southwest has alleged that Westinghouse negligently failed to perform this contractual duty. The characterization of the breach of the agreement to repair as being negligent is collateral to the central issue. The significant issue is whether Westinghouse can (1) agree that it will repair its product and (2) simultaneously provide that no damages accrue for its failure to repair, thereby rendering its agreement to repair meaningless.

Thus, whether the wrong of Westinghouse is called tort, breach of contract, breach of warranty or something else is not significant to the disposition of the problem sought to be brought to this Court.

INTERPRETATION OF LAW

There is no Pennsylvania state or federal decision announcing the law as Westinghouse claims it to be.

After enumerating the cases cited by the District Court and by the Court of Appeals, Westinghouse states:

> "Southwest has not contended that these decisions were improperly applied." (Response, p. 7)

This is an incorrect statement of the position of Southwest. Southwest *does* contend the decisions there enumerated were "improperly applied." Those decisions were improperly applied because

they do not support nor compel the decisions of the District Court and the Court of Appeals.

An examination of the opinions cited by the Court of Appeals reveals none of them are directly applicable to the question of a negligent failure to perform an express agreement to repair.[1]

Two of the decisions cited by the Court of Appeals have been considered to be archaic by implication. United States District Judge Weber of the Western District of Pennsylvania stated in *Neville Chemical Company v. Union Carbide Corporation,* (1968), 294 F Supp 649 at 657:

"Because of this strongly reiterated statement of public policy, we do not consider cases of *earlier vintage* on the effect of such

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[1] *Mayo v McCloskey & Co.*, ED Pa, 1961, 200 F Supp 7, construed a contract that did not contain an agreement to repair. The contract expressly exculpated the seller of a home from any claims or demands "resulting from any cause" including those arising from "negligence and latent or undiscovered defects." *Shafer v. Reo Motors, Inc.*, ED Pa, 1962, 108 F Supp 659, involved the sale of a motor vehicle with a warranty to repair during the first 4,000 miles or first 90 days after delivery. The loss occurred after the vehicle had been driven 4,000 miles and after 90 days had expired. There was no request of the seller nor opportunity to the seller to repair. In *Charles Lachman Co. v. Hercules Powder Co.*, ED Pa, 1948, 79 F Supp 206, there was no agreement to repair. There was no request to repair nor was there any attempt to repair. *Eimco Corporation v. Joseph Lombardi & Sons,* 193 Pa Super 1, 162 A2d 263, involved an agreement to replace parts. After a failure of the product, the buyer incurred expenses in repairing, and thereafter requested the seller to repair. The seller properly repaired upon request and there was no further malfunction of the product. The suit was only for the expenses incurred before the seller was requested to repair. *Magar v. Lifetime, Inc.*, 187 Pa Super 143, 144 A2d 747, involved an agreement to repair with a one year limitation. Since the plaintiff's recovery was based upon the entire consideration paid to defendant, the Court reversed because the proof did not establish "the extent of the damage for which the defendant was solely responsible." *Siegel Co. v. Philadelphia Record Co.*, 1944, 348 Pa 245, 35 A2d 408, upheld an exculpation provision in a lease expressly relieving the lessor from liability for water damage caused by its own negligence. *Atherton v. Clearview Coal Co,* 1920, 267 Pa 425, 110 Atl 298, held that a general exculpation of liability contained in a deed was not against public policy. *Cannon v. Bresch*, 1932, 307 Pa 31, 160 Atl 595, and *Wright v. Sterling Land. Co.*, 1945, 157 Pa Super 625, 43 A2d 614, each held that a provision in a lease exculpating lessor from liability in general terms was sufficient to exculpate the lessor from liability caused by the negligence of lessor.

disclaimers to be of valid current authority. Cf. Shafer v. Reo Motors, 205 F.2d 685 [3rd Cir., 1953] and Charles Lachman Co. v. Hercules Powder Co., 79 F. Supp. 206 [E.D. Pa., 1948]." (Emphasis supplied.)

Before stating the 1948 case and 1953 case relied upon by the Court of Appeals were of "earlier vintage" under the law of Pennsylvania, Judge Weber described the law of Pennsylvania in the following language:

> "This strict limitation on disclaimers of liability for damages for negligence is a social development of recent years and is strongly emphasized in many recent decisions of the Supreme Court of Pennsylvania."

Examination of the authorities[2] cited by Judge Weber in support of the foregoing statement reveal them to be relatively recent pronouncements in direct conflict with several of the cases relied upon by the Court of Appeals.

Judge Weber's decision was appealed to the Third Circuit Court of Appeals and insofar as his decision on liability was concerned, was affirmed. *Neville Chemical Company v. Union Carbide Corporation*, CA 3rd 1970, 422 F2d 1205. The Third Circuit opinion reviews in considerable detail Pennsylvania law applicable to attempted contractual exculpation of liability in a contract of sale of personal property. (422 F2d 1216-1221). It is of interest that three of the cases[3] cited by the Ninth Circuit Court of Appeals in the instant case are not considered by the Third Circuit Court of Appeals to be authoritative.

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[2] *Dilks v. Flohr Chevrolet*, 1963, 411 Pa 425, 192 A2d 682; *Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc.*, 1961, 404 Pa 53, 171 A2d 185; *Employers Liability Assurance Corp. v. Greenville Businessmen's Association*, 1966, 423 Pa 288, 224 A2d 620; *Galligan v. Arovitch*, 1966, 421 Pa 301, 219 A2d 463.

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[3] *Charles Lachman Co. v. Hercules Powder Co., supra*, (a Federal District Court 1948 opinion) is rather clearly overruled. *Shafer v. Reo Motors, supra*, (a 1953 Third Circuit Court of Appeals opinion) is overruled by implication. *Cannon v. Bresch, supra*, (a 1932 Supreme Court of Pennsylvania opinion) is distinguished. (422 F2d 1218.)

Neville Chemical Company v. Union Carbide Corporation, supra, construed a contract whereby a seller of goods attempted to exculpate itself from liability. The jury found the seller negligent in manufacture of the goods and the court held that the exculpation, by failing to specifically mention seller's negligence, was ineffective to free the seller from liability. In this respect the Third Circuit opinion is in direct conflict with the holding of the United States District Court herein (Appendix p. xxix-xxx) and with the opinion of the Ninth Circuit Court of Appeals herein (Appendix pp. x-xi).

Of interest is the statement by the Third Circuit Court of Appeals that Pennsylvania law in this regard is "basically the same" as that of California and New York (422 F2d 1217, note 17). The two cases cited in support of this statement held exculpatory clauses in general language in a contract of sale of goods insufficient to exculpate the seller from liability for the seller's negligence. Paradoxically, the Ninth Circuit Court of Appeals in the instant case cited a California decision, *Seely v. White Motor Company,* 45 Cal Rptr 17, 403 P2d 145 (Appendix, p. xi). That opinion supports *only* the position of Southwest. In that case, the warranty for the sale of a motor vehicle contained the same agreement and limitation as Westinghouse included in its warranty herein. The seller was unsuccessful in accomplishing repairs of a multitude of defects (403 P2d 150). The Supreme Court of California stated:

> "When, as here, the warrantor repeatedly fails to correct the defect as promised, it is liable for the breach of that promise as a breach of warranty." (403 P2d 148)

The Court not only affirmed an award for direct damages but also affirmed an award for consequential damages consisting of lost profits.

Indeed, Pennsylvania law as reflected by the decisions in 1969 and 1970 belies the approach of the Ninth Circuit Court of Appeals. *MacDougall v. Ford Motor Company,* 214 Pa Super 384, 257 A2d 676, held the doctrine of strict liability in tort

applicable to claims for property damage as well as to claims for bodily injury; a holding in conflict with the Ninth Circuit Court of Appeals (Appendix p. xii).

A similar statement, albeit dicta, was made by the Pennsylvania Supreme Court in *Kassab v. Central Soya*, 432 Pa 217, 246 A2d 848, 854, note 7, while holding privity was no longer required in an action for breach of warranty.

A review of recent Pennsylvania law reveals a trend which could and should have been employed by the Ninth Circuit Court of Appeals to attain the opposite result reached.

The case of Southwest v. Westinghouse provides a question not yet expressly decided by the Pennsylvania courts and yet common to all 50 states. Since every state in the Union has adopted the Uniform Commercial Code, a decision such as urged by Southwest would likely be of significant import throughout the land.

CONCLUSION

The issues of this case are worthy of the attention of this Court, are of current concern to the public and should be decided by this Court.

Respectfully submitted,

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